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Supreme Court of the United States

October Term, 1954

No. 28

EVELYN RICE,
Petitioner,

vs.

SIOUX CITY MEMORIAL PARK CEMETERY, INCORPORATED, A Corporation; F. K. LYTLE, and J. M. GUNNELL
Respondents.

PETITION FOR REHEARING

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COCKLE PRINTING CO., LAW BRIEFS, OMAHA

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MAY IT PLEASE THE COURT:

On February 15, 1954, petitioner sought certiorari in this Court, and on April 12, 1954, certiorari was granted (R. 50). The case was orally argued on its merits to eight members of this Court on the 8th day of November, 1954. On November 15, 1954, the judgment of the Supreme Court of Iowa was affirmed by an equally divided Court without an opinion.

The issues involved are whether the Supreme Court of Iowa by its ruling has committed such state action as is in violation of:

(1) Due process of law under the Fourteenth Amendment.

(2) The equal protection clause of the Fourteenth Amendment.

(3) The United Nations Charter, and

(4) The public policy of the United States.

A final determination of this case must directly involve each of these four issues, and the Supreme Court of Iowa in defeating petitioner directly ruled on these propositions.

Each of the four propositions involve basic and fundamental human rights as they are applied to the facts of this case. The result of the affirmance by an evenly divided Court without opinion is that the final word on these fundamental and important federal questions has been rendered by the Iowa Supreme Court, contrary not only to the belief of this petitioner but also to the belief of four members of this Court. That the problems presented are of great national importance is evidenced not only by the facts of this case but also by the fact that certiorari was granted by this Court. These questions of great public importance now remain unresolved by this Court. The question of the applicability of the Charter is so acute that some believe a constitutional amendment is needed to limit the treaty power.

Without a written opinion to which this petition for rehearing might be addressed, it is impossible for petitioner to know which points should be stressed.

From the questions asked at the time of the oral summation, it is apparent that at least some of the Court had difficulty with what was an apparent attempt to reform or redraw a contract. Others indicated an interest, if not a problem, in the effect which petitioner's success might have on religious cemeteries. There was likewise

an indication of a possible doubt as to whether the Iowa Court's ruling amounted to state action at all.

To the questions of rewriting the contract and state action, we respectfully urge a reconsideration of *Hurd v. Hodge, Shelley v. Kraemer,* and *Barrows v. Jackson,* referred to in our Brief on the Merits. We are no more seeking a rewriting of the contract here than were the parties in those cases who were directly or indirectly interested in seeing that no life or force be given to the racial restrictive covenant involved. It isn't so much a question of rewriting the contract as it is of refusing to give judicial sanction to a legally offensive racial restrictive covenant.

As to the question of the effect on religious cemeteries, if that caused any of the Justices to vote for affirmance, we will ask again that they reconsider the meaning and function of the First Amendment to the United States Constitution and the cases which indicate that, where there is a possible clash between the First and Fourteenth Amendments, the Court must weigh the conflicting interests, and, in the case of religious cemeteries, the guarantee of religious freedom could and should override the guarantee of equal protection. See *Watson v. Jones,* 80 U. S. 679 (1871); *McGuire v. Trustees of St. Patrick's Cathedral,* 54 Hun 207 (1889); *Kedroff v. St. Nicholas Cathedral,* 344 U. S. 94 (1952).

At the time of the oral arguments, the Court had only eight members because of the untimely death of Mr. Justice Jackson, and the President has now nominated a successor who is yet to be confirmed by the Senate. Because of the great and obvious importance to this peti-

tioner, because the issues involve fundamental human rights under our Constitution, treaties, and public policy, and because of the great public importance of this discussion and decision on racial restrictive covenants in public cemeteries, we appeal to the sound discretion of this Court and ask that a rehearing be ordered after the new Justice has been confirmed and has taken his place on the Court. A decision can then be made either for or against this petitioner in a written opinion which will serve as a guide or as an answer to future situations involving the racial restrictive covenants in public cemeteries and involving the question of whether a racial restrictive covenant may be used as a defense in a damage action.

Respectfully submitted,

NEIL R. MCCLUHAN,

Winnebago, Nebraska,

LOWELL C. KINDIG,

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Sioux City 1, Iowa,

Counsel for Petitioner.

KINDIG & BEEBE,

Of Counsel.

CERTIFICATE OF COUNSEL

We, Lowell C. Kindig and Neil R. McCluhan, counsel for petitioner, hereby certify that this Petition for Rehearing is presented in good faith and not for delay, and further certify that the time involved in a rehearing will in no way adversely affect either the petitioner or the respondent.

NEIL R. MCCLUHAN,
Winnebago, Nebraska,
LOWELL C. KINDIG,
503 Toy National Bank Building,
Sioux City 1, Iowa,
Counsel for Petitioner.

PROOF OF SERVICE

I, Lowell C. Kindig, one of the attorneys for petitioner, hereby certify that on the ..... day of December, 1954, I served a copy of the within Petition for Rehearing upon Jesse E. Marshall and H. C. Harper, attorneys for respondent, in their respective offices, by personally delivering a copy to them.

LOWELL C. KINDIG,
503 Toy National Bank Building,
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